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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

TREASURE ISLE, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Section 1962(c) of Title 18 of the United States Code makes it unlawful for any "person" employed by or associated with any "enterprise" to conduct or participate in the conduct of such enterprise's affairs through a pattern of racketeering activity. The question presented is:

Whether an indictment can be valid when it charges a violation of Section 1962(c) but fails to allege that the "person" and the "enterprise" are separate entities.

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TREASURE ISLE, INC.,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, TREASURE ISLE, INC., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on June 17, 1982.

OPINIONS BELOW

The June 17, 1982 opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 678 F.2d 961. The slip sheet opinion and the judgment of the Eleventh Circuit are set out in the appendix accompanying this petition (App. 1a-63a, 64a).

The order of the United States Court of Appeals for the Eleventh Circuit denying rehearing and rehearing *en banc* is not presently reported. This order is also set out in the appendix accompanying this petition (App. 65a).

JURISDICTION

The opinion and judgment of the Court of Appeals was entered on June 17, 1982. The Court of Appeals denied a timely petition for rehearing on September 8, 1982. This petition for a writ of certiorari was timely filed within sixty days therefrom pursuant to Supreme Court Rule 20.1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18:

Section 1961. Definitions

As used in this chapter –

* * *

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

* * *

Section 1962. Prohibited Activities

• • •

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

STATEMENT OF THE CASE

The petitioner Treasure Isle, Inc. ("Treasure Isle"),[1] a publicly held Florida corporation specializing in the production of breaded seafood products, was indicted by a federal grand jury in the United States District Court for the Middle District of Florida (R. XCVII 1-15).[2] Also indicted were one of Treasure Isle's vice-presidents, its plant manager, and its assistant plant manager.[3]

The indictment in this case contained thirty-three counts. The first thirty-two counts charged Treasure Isle

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[1]Pursuant to Supreme Court Rule 28.1, Treasure Isle, Inc. has no parent company, subsidiaries (except wholly owned subsidiaries) or affiliates.

[2]"R." refers to the record on appeal in the Court of Appeals.

[3]The assistant plant manager was found not guilty by the jury and is no longer a party to these proceedings. G. Cecil Hartley, the vice-president, and Travis Dell, the plant manager, were parties in the court below and join in this petition for a writ of certiorari pursuant to Rules 19.4 and 19.6 of this Court. They were prejudiced by the allegation in the indictment which is the subject of this petition.

and the individual co-defendants with conspiring to defraud the United States, mail fraud, and the interstate transportation of United States Treasury checks obtained by fraud. Reduced to its simplest form, this indictment alleged that Treasure Isle defrauded the United States Department of Defense by deliberately supplying it with frozen breaded shrimp that were smaller than the size represented on the invoices submitted and which did not conform to specific contract requirements. It was further alleged that this scheme to defraud the United States was concealed from government inspectors by criminal acts carried out by the named individual co-defendants and other, unindicted, lower-level company employees.

Count thirty-three of the indictment charged Treasure Isle and the individual co-defendants with violating 18 U.S.C. § 1962(c), a subpart of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Specifically, count thirty-three charged that Treasure Isle and the co-defendants "being employed by and associated with an enterprise * * * to wit: Treasure Isle, Inc., conducted and participated * * * in the conduct of the affairs of the enterprise through a pattern of racketeering activity, * * * (R. XCVII 13). The criminal acts charged in the previous thirty-two counts were alleged to be the "pattern of racketeering activity" defined in 18 U.S.C. § 1961(1).

Motions were presented to the trial court by Treasure Isle pretrial (R. XCVII 32, 37; XCVIII 300-01, 347), at the close of the Government's case-in-chief (R. LII 5499-5502), at the close of all of the evidence (R. LXVIII 7276-80), and post-trial (R. CIII 1919) attacking the legal validity of count thirty-three of the indictment because it alleged that the same entity, Treasure Isle, was both the RICO defendant and the RICO "enterprise." All of these motions were denied (R. XCIX 476-77; LII 5538; LXVIII 7278-81; CIII 1960-61).

After a lengthy jury trial Treasure Isle was found guilty on all thirty-three counts and ordered to pay a $167,000.00 fine and serve a term of probation.

At the trial, there was no testimony or evidence that the fraud perpetrated by the individual co-defendants was conducted with corporate sanction or approval, and none of the other officers, directors or stockholders of the company were implicated. Instead, the Government's sole theory of Treasure Isle's criminal liability was based upon the common law doctrine of *respondeat superior*, and the jury was so instructed (R. LXXVI 7886-7888).

Treasure Isle timely appealed to the United States Court of Appeals for the Eleventh Circuit which affirmed the judgments of conviction. The Eleventh Circuit held that a corporation could lawfully be a RICO defendant while at the same time being the RICO "enterprise":

> Considering the broad reading given the term "enterprise" in [*United States* v. *Turkette*, 452 U.S. 576 (1981)], the [Supreme] Court's willingness to expand the scope of RICO's application, and absent any prohibition of Treasure Isle assuming a dual role, we answer our inquiry in the affirmative. A corporation may be simultaneously both a defendant and the enterprise under RICO. (App. 54a).

REASONS FOR GRANTING THE WRIT

1. The Decision Below Raises Significant Problems Concerning The Proper Construction Of 18 U.S.C. § 1962(c) Which Should be Settled By This Court.

The Eleventh Circuit's opinion in this case effectively rewrites Section 1962(c) and is inconsistent with the statutory language and its Congressional purpose.

The primary purpose which underlay RICO's enactment was "the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce." S. Rep. No. 91-617, 91st Cong., 1st Sess. 76 (1969). *See also United States v. Turkette,* 452 U.S. 576, 591 (1981) (dictum). Section 1962(c)'s aim is to prevent organized crime from using a legitimate business as a basis for conducting racketeering activities.

To prove a violation of Section 1962(c), the Government must prove: (1) employment by or association of a "person" (the defendant) with (2) an "enterprise" (3) engaged in or affecting interstate commerce (4) the affairs of which are conducted by or participated in by the defendant through a pattern of racketeering activity. *United States* v. *Phillips,* 664 F.2d 971, 1011 (5th Cir. 1981); *United States* v. *Griffin,* 660 F.2d 996, 999 (4th Cir. 1981), *cert. denied,* ____ U.S.____, 102 S.Ct. 1029, 71 L.Ed.2d 313 (1982). Section 1962(c) does not criminalize engaging in a pattern of racketeering activity standing alone; the gravamen of the offense is the conduct of an "enterprise" through a pattern of racketeering activity by a "person" *associated with* or *employed by* that enterprise. *United States* v. *Phillips, supra.*

The precise language of Section 1962(c) analyzed in light of its purpose requires that there be the interaction of two distinct parties: a *person* employed by or associated with an *enterprise*. *Bays* v. *Hunter Savings Assoc.*, 539 F.Supp. 1020, 1023-24 (S.D. Ohio 1982); *Parnes* v. *Heinold Commodities, Inc.*, 539 F.Supp. 199, 203 (N.D.Ill. 1982). Section 1962(c) does not punish the enterprise, but only those persons who seek to participate in the affairs of the enterprise through racketeering.

However, the Eleventh Circuit's opinion distorts Section 1962(c)'s language and expands it scope beyond that intended by Congress. The Court of Appeals adopted the superficial reasoning that since a corporation literally can be a RICO "enterprise" and a RICO "person" under the definitions contained in Section 1961(3) and (4) it therefore can simultaneously be both the "enterprise" and the defendant. (App. 53a-54a). In so ruling, the Eleventh Circuit failed to adhere to the requirement that a violation of Section 1962(c) involve an "enterprise" distinct from the "person".

Two absurd results flow from the Eleventh Circuit's opinion. First, a corporation can be punished criminally for being employed by or associated with itself. This unilateral expansion of corporate criminal liability is inconsistent both with this Court's time-tested opinion that an individual cannot conspire with himself, *Morrison* v. *California*, 291 U.S. 82, 92 (1934), and with the holdings of the other Courts of Appeals that a corporation cannot conspire with itself. *See, e.g., Girard* v. *94th Street and Fifth Avenue Corp.*, 530 F.2d 66, 70-71 (2d Cir.), *cert denied*, 425 U.S. 974 (1976); *Baker* v. *Stuart Broadcasting Co.*, 505 F.2d 181 (8th Cir. 1974); *Dombrowski* v. *Dowling*, 459 F.2d 190, 196 (7th Cir. 1972); *Zellinger* v. *Uvalde Rock Asphalt Co.*, 316 F.2d 47, 52 (10th Cir. 1963);

Nelson Radio & Supply Co. v. *Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953). IF a corporation cannot conspire with itself, it logically follows that it cannot be "employed by or associated with" itself.

Second, if the same corporation can simultaneously be both the RICO "person" and the RICO "enterprise" then it can be subjected to the Draconian measures of divestitute, dissolution, reorganization, treble damages, and forfeiture[4] when lower-level employees have committed two of the criminal acts enumerated in Section 1961(1) without corporate sanction. Under the Eleventh Circuit's misguided application of *respondeat superior* to Section 1962(c) it is the "enterprise" and not the "racketeer" which is being punished for the RICO violation.

The Eleventh Circuit's unwarranted expansion of Section 1962(c)'s reach will have an immediate and recurring impact upon the criminal and civil liability of corporations and other legal entities such as partnerships and labor unions under RICO. This case is but one example of the United States Department of Justice's ongoing perversion of RICO to persecute legitimate corporations accused of conventional crimes. *See, e.g., United States* v. *Uni Oil, Inc.*, 646 F.2d 946 (5th Cir. 1981), *cert. denied*, ____ U.S.____, 102 S.Ct. 1254, 71 L.Ed.2d 446 (1982); *United States* v. *Marubeni America Corp.*, 611 F.2d 763 (9th Cir. 1980); *United States* v. *Computer Sciences Corp.*, 511 F.Supp. 1125 (E.D.Va. 1981), *aff'd in part*, ____F.2d____, No. 81-5053 (4th Cir. June 16, 1982). In addition, RICO is increasingly being used as a weapon in ordinary civil lawsuits against corporate defendants. *See, e.g., Waterman Steamship Corp.* v. *Avondale Shipyards,*

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[4]18 U.S.C. §§ 1963(a); 1964.

Inc., 527 F.Supp. 256 (E.D.La. 1981); *Landmark Savings & Loan* v. *Loeb Rhoades, Hornblower & Co.*, 527 F.Supp. 206 (E.D. Mich. 1981); *Kleiner* v. *First National Bank of Atlanta*, 526 F.Supp. 1019 (N.D.Ga. 1981).

The far-reaching and bizarre consequences of the Eleventh Circuit's decision requires review by this Court.[5]

2. The Decision Below Conflicts With The Decisions Of Other Federal Courts Holding That There Cannot Be Identity Of The RICO "Enterprise" And The RICO "Person."

On the day prior to the Eleventh Circuit's opinion in this case, the Fourth Circuit handed down an opinion in which it affirmed the dismissal of a similar alleged Section 1962(c) violation, and it held that the same corporation could not be both the RICO "enterprise" and the RICO "person." *United States* v. *Computer Sciences Corp.*, ____F.2d____, No. 81-5053 (4th Cir. June 16, 1982) (pet. for reh'g denied Sept. 27, 1982), *aff'g and rev'g*, 511 F.Supp. 1125 (E.D.Va. 1981.)[6] The Fourth Circuit pointed out that a corporation, like any defendant, cannot conspire with itself and said:

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[5]In *United States* v. *Turkette*, 452 U.S. 576 (1981), this Court gave a liberal construction to the term "enterprise" and held that the term encompasses both legitimate and illegitimate organizations. Although *Turkette* settles that term's application to illegitimate organizations, the decision did not determine, directly or indirectly, whether the "person" can be the same entity as the "enterprise."

[6]Count two of the indictment in that case charged the corporation with conducting the affairs of an enterprise – one of the corporation's unincorporated divisions – through a pattern of racketeering in violation of 18 U.S.C. § 1962(c).

> *** We conclude that "enterprise" was meant to refer to a being different from, not the same as or part of, the person whose behavior the act was designed to prohibit, and, failing that, to punish. *Slip op.* at 25.

The conflict between the decision below and *Computer Sciences* is irreconcilable.

The Eleventh Circuit's opinion also directly conflicts with every federal district court that has been called upon to rule on this issue. *Bays* v. *Hunter Savings Assoc.*, 539 F.Supp. 1020 (S.D. Ohio 1982); *Parnes* v. *Heinold Commodities, Inc.*, 539 F.Supp. 199 (N.D. Ill. 1982); *Van Schaick* v. *Church of Scientology of California, Inc.*, 535 F.Supp. 1125, 1135-36 (D. Mass. 1982). *See also Landmark Savings & Loan* v. *Loeb Rhoades, Hornblower & Co.*, 527 F.Supp. 206, 208 (E.D. Mich. 1981) (dictum).

These conflicts justify the grant of certiorari to review the Eleventh Circuit's decision in this case. The broad-side of civil and criminal RICO cases being launched against legitimate corporations underscores the desirability of a thorough review of the legal issue presented here by this Court so that litigants and the lower courts may properly gauge the scope of corporate liability under Section 1962(c).

RULE 19 STATEMENT

Pursuant to Rules 19.4 and 19.6 of this Court, the petitioner herein, Treasure Isle, Inc., adopts by reference the arguments and legal authorities presented to this Court by G. Cecil Hartley and Travis Dell, the petitioner's co-appellants below, in their petition for a writ of certiorari filed with this Court as though fully set forth herein.

CONCLUSION

For all the reasons stated above, a writ of certiorari must issue to review the judgment and opinion of the Eleventh Circuit.

Respectfully submitted,

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